Siti Aishah bt Sheikh Abd Kadir v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-06B-62–11 OF 2011
ABDUL MALIK ISHAK, APANDI ALI AND MOHTARUDIN BAKI JJCA
8 MAY 2013

Evidence — Presumption — Whether wrong presumption invoked — Whether accused prejudiced by having to rebut wrong burden — Whether miscarriage of justice occurred warranting setting aside of conviction and sentence — Whether trial judge failed to properly consider defence case — Whether reasonable doubt raised on prosecution case — Whether adverse inference should be invoked on prosecution failure to call material witness

The appellant, who was the deputy director of a division in the National Library in Kuala Lumpur, was convicted by the sessions court of two offences under s 15(1) of the Anti-Corruption Act 1997 ('the Act') in that she had misused her official position to award a contract for the supply of souvenirs to the National Library to a company ('SJI') owned by her husband. The contracts under the two charges had a total value of RM62,550. The appellant was sentenced to six months' jail and a RM94,000 fine on one charge and six months' jail and a fine of RM218,750 on the other. She paid the fines as default in paying them carried another six-month jail term. On appeal, the High Court affirmed the convictions and fines but reduced the jail terms to 14 days on each charge and ordered the sentences to run consecutively. In her instant appeal the appellant contended that the sessions court invoked the wrong presumption against her under the Act ie that it invoked the presumption under s 42(1) instead of that under s 15(2) of the Act and went on to hold that she had failed to rebut that presumption. She also contended that the trial court failed to properly consider her defence that it was the secretariat of the National Library, and not she, which selected SJI as the supplier of the souvenir items.

Held, allowing the appeal, setting aside the convictions and sentences, acquitting and discharging the appellant and ordering the fines she had paid to be refunded to her:

(1) The sessions court misdirected itself when it invoked the presumption under s 42(1) of the Act against the appellant. The High Court similarly erred when it affirmed that decision. There was no evidence the prerequisites or conditions precedent to s 42(1) had been proved by the prosecution for the presumption thereunder to be invoked. The presumption that should have been rightly invoked was under s 15(2) of the Act (see paras 13–14 & 16).

(2) Although the trial judge referred to s 15(1) and (2) of the Act in her grounds of judgment, she failed to make any finding whether the appellant had rebutted the presumption under s 15(2). This failure was a serious misdirection warranting appellate intervention. The invocation of the wrong presumption prejudiced the appellant and caused a miscarriage of justice as the appellant was required to rebut a presumption which, on the facts and in law, did not apply and resulted in a wrong burden being imposed on the appellant (see paras 19 & 22).

(3) The trial judge failed to adequately consider or appreciate the defence's case. The evidence of SD3 (a member of the secretariat) and SD2 (who assisted the secretariat and liaised with suppliers) corroborated the appellant's evidence that it was the secretariat that decided to award the contract to SJI based on the samples and the pricing. The two witnesses were very clear in their evidence that the appellant did not, at any time, interfere with the decision making process of the secretariat (see paras 31–32).

(4) The prosecution did not challenge the evidence of SD2 and SD3 and put to them that the secretariat was not in charge of the selection. Their evidence taken cumulatively succeeded in raising a reasonable doubt on the prosecution's case. Yet, the trial judge did not give any reasonable reason why their evidence could not be believed (see paras 34 & 37).

(5))The prosecution failed to call the appellant's husband, a material witness, although his name was mentioned in both the charges. The failure to call the husband prejudiced and disadvantaged the defence. Section 114(g) of the Evidence Act 1950 ought to be invoked against the prosecution (see paras 8–9).

(6) There was a failure by both the trial court and the High Court to consider the appellant's cautioned statement which should have been considered and weighed accordingly. This constituted a non-direction which amounted to a misdirection (see para 46).

(7) Mens rea was a necessary ingredient of the offence under s 15(1) of the Act. As the trial court acknowledged that there was 'carelessness' on the part of the appellant, then that finding should have been construed as a defence because there was no mens rea on the appellant's part to commit the offence (see para 48).

[Bahasa Malaysia summary

Perayu, yang merupakan timbalan pengarah di satu bahagian di Perpustakaan Negara Kuala Lumpur telah disabitkan oleh mahkamah sesyen untuk dua kesalahan di bawah s 15(1) Akta Pencegahan Rasuah 1997 ('Akta tersebut') di mana dia telah menyalahgunakan kedudukan rasminya untuk mengawardkan kontrak bagi bekalan cenderamata kepada Perpustakaan Negara kepada sebuah

syarikat ('SJI') yang dimiliki oleh suaminya. Kontrak-kontrak di bawah dua pertuduhan itu keseluruhan bernilai RM62,550. Perayu telah dijatuhkan hukuman enam bulan penjara dan denda RM94,000 atas satu pertuduhan dan enam bulan penjara dan denda RM218,750 untuk satu lagi pertuduhan. Dia telah membayar denda-denda itu kerana kegagalan untuk membayar membawa kepada tempoh penjara selama enam bulan lagi. Atas rayuan, Mahkamah Tinggi mengesahkan sabitan-sabitan dan denda-denda tetapi menjadikan tempoh-tempoh penjara dikurangkan kepada 14 hari untuk setiap pertuduhan dan memerintahkan sabitan-sabitan dan denda-denda itu berjalan berturut-turut. Dalam rayuan ini perayu berhujah bahawa mahkamah sesyen telah menggunakan andaian salah terhadapnya di bawah Akta tersebut iaitu di mana ia menggunakan andaian di bawah s 42(1) dan bukan di bawah s 15(2) Akta tersebut dan selanjutnya memutuskan bahawa dia telah gagal untuk mencabar andaian tersebut. Dia juga berhujah bahawa mahkamah perbicaraan itu telah gagal untuk mengambil kira dengan betul pembelaannya bahawa ia adalah setiausaha Perpustakaan Negara, dan bukan dia yang telah memilih SJI sebagai pembekal barangan cenderahati itu.

Diputuskan, membenarkan rayuan, mengetepikan dan sabitan-sabitan dan hukuman-hukuman, pelepasan dan pembebasan perayu and memerintahkan denda-denda yang dibayar olehnya dikembalikan kepadanya:

(1) Mahkamah sesyen telah salah arah apabila menggunakan andaian bawah s 42(1) Akta tersebut terhadap perayu. Mahkamah Tinggi juga terkhilaf apabila mengesahkan keputusan tersebut. Tiada keterangan yang prasyarat atau syarat terdahulu daripada s 42(1) telah dibuktikan oeh pendakwaan untuk andaian itu digunakan. Andaian yang sewajarnya patut digunakan adalah di bawah s 15(2) Akta tersebut (lihat perenggan 13–14 & 16).

(2) Walaupun hakim perbicaraan merujuk kepada s 15(1) dan (2) Akta tersebut dalam alasan penghakim beliau, beliau gagal membuat apa-apa penemuan sama ada perayu telah mematahkan andaian di bawah s 15(2). Kegagalan ini adalah salah arah serius yang mewajarkan campur tangan mahkamah rayuan. Penggunaan andaian yang akan memprejudiskan perayu dan menyebabkan keadilan tidak dilaksanakan kerana perayu dikehendaki mematahkan andaian yang mana, atas fakta dan undang-undang, tidak terpakai dan mengakibatkan beban salah diletakkan ke atas perayu (lihat perenggan 19 & 22).

(3) Hakim perbicaraan telah gagal untuk sewajarnya mengambil kira atau memahami kes pembelaan. Keterangan D3 (ahli sekretariat) dan SD2 (yang membantu sekretariat dan berhubung dengan pembekal-pembekal) telah menyokong keterangan perayu bahawa sekretariat yang memutuskan untuk mengawardkan kontrak kepada SJI berdasarkan sampel-sampel dan harga. Dua saksi dengan jelas dalam

keterangan mereka menyatakan perayu tidak, pada bila-bila masa, campur tangan dengan proses membuat keputusan sekretariat (lihat perenggan 31–32).

(4) Pendakwaan tidak mencabar keterangan SD2 dan SD3 dan mengemukakan kepada mereka bahawa sekretariat tidak bertanggungjawab untuk pemilihan. Keterangan mereka diambil secara kumulatif telah berjaya menimbulkan keraguan munasabah dalam kes pendakwaan. Namun, hakim perbicaraan tidak memberikan apa-apa sebab munasabah kenapa keterangan mereka tidak boleh dipercayai (lihat perengan 37 & 34).

(5) Pendakwaan telah gagal memanggil suami perayu, saksi penting, meskipun namanya telah disebut dalam kedua-dua pertuduhan. Kegagalan memanggil suami perayu telah memprejudis dan melemahkan pembelaan. Seksyen 114(g) Akta Keterangan 1950 patut digunakan terhadap pendakwaan (lihat perenggan 8–9).

(6) Terdapat kegagalan oleh kedua-dua mahkamah perbicaraan dan Mahkamah Tinggi untuk mempertimbangkan penyataan beramaran perayu yang patut dipertimbangkan dan diteliti sewajarnya. Ini membentuk ketiadaan arah yang menjadi satu salah arah (lihat perenggan 46).

(7) Mens rea adalah elemen yang perlu dalam kesalahan di bawah s 15(1) Akta tersebut. Oleh kerana mahkamah mengenalpasti bahawa terdapat 'carelessness' di pihak perayu, maka penemuan tersebut patut ditafsirkan sebagai satu pembelaan kerana tiada mens rea di pihak perayu untuk melakukan kesalahan itu (lihat perenggan 48).]

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)
Allchurch v Cooper [1923] SASR 370 (refd)
Ayoromi Helen v PP [2005] 1 MLJ 699, CA (refd)
Balasingham v PP [1959] 1 MLJ 193 (refd)
Chan Chor Shuh v PP [2003] 2 MLJ 26, CA (refd)
Chee Chiew Heong v PP [1981] 2 MLJ 287 (refd)
Ganapathy a/l Rengasamy v PP [1998] 2 MLJ 577, FC (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137 ; [1993] 2 AMR 27, SC (refd)
Gunalan a/l Ramachandran & Ors v PP [2006] 2 MLJ 197; [2006] 1 CLJ 857, FC (refd)
He Kaw Teh v R (1985) 157 CLR 523, HC (refd)
Kumaraguru a/l N Muniandy & Ors v PP [1994] 1 MLJ 254, HC (refd)
Kwaku Mensah v R [1946] AC 83, PC (refd)
Lim Guan Eng v PP [1998] 3 MLJ 14, CA (refd)
Mardani bin Hussin v PP [2011] 4 MLJ 83; [2009] 6 CLJ 301, CA (refd)

Mraz v The Queen (1955) 93 CLR 493 (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Neville v PP [1992] 1 SLR 153, CA (refd)
Ng Kim Huat v PP [1961] 1 MLJ 308 (refd)
Ong Ah Too v Regina [1955] 1 MLJ 247, CA (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137, SC (refd)
Pendakwa Raya lwn Mohd Zulkifli bin Abdul Ghani dan satu lagi [2003] 5 MLJ 337, HC (refd)
PP v Johar Mustafa [2003] MLJU 342; [2004] 5 CLJ 187, HC (refd)
R v Emmanuel [1998] Crim LR 347, CA (refd)
R v George Anthony Porritt (1961) 45 Cr App R 348 (refd)
Seneviratne v R [1936] 3 All ER 36, PC (refd)
Syed Abu Bakar bin Ahmad v PP [1984] 2 MLJ 19, FC (refd)
Tengku Mahmood v PP [1974] 1 MLJ 110 (refd)
Thomas @ Severinus bin Kandadi v PP [2009] 7 MLJ 803, HC (refd)

Legislation referred to

Anti-Corruption Act 1997 ss 15(1), (2), 42, (1)
Criminal Procedure Code s 173(m)(i)
Evidence Act 1950 s 114(g)

Appeal from: Criminal Appeal No 42A-54 of 2010 (High Court, Kuala Lumpur)

Hisyam Teh Poh Teik (Zamani Ibrahim with him) (Teh Poh Teik & Co) for the appellant.
Mohd Sophian bin Zakaria (Deputy Public Prosecutor, Malaysian Anti-Corruption Commission) for the respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] Before the sessions court, the appellant was charged for two offences under s 15(1) of the Anti-Corruption Act 1997 (Act 575) ('ACA') and punishable under s 16 of the ACA. The two charges were worded in this way:

Pertuduhan Pertama

Bahawa kamu, pada 26 April 2004 di Perpustakaan Negara Malaysia, Tingkat 17 Menara TH Selborn, Jalan Tun Razak, dalam daerah Kuala Lumpur dalam Wilayah Persekutuan, sebagai pegawai badan awam, iaitu Timbalan Pengarah Bahagian Gerakan Literasi Maklumat, Perpustakaan Negara Malaysia telah menggunakan jawatan kamu itu untuk mendapatkan suapan apabila membuat keputusan memilih SJI Resources Sdn Bhd untuk membekalkan cenderamata kepada Perpustakaan Negara Malaysia dengan harga pembekalan sebanyak RM18,800.00, yang

berhubungan dengan perkara yang suami kamu iaitu M Isa Bin Halilhan mempunyai kepentingan, yang mana SJI Resources Sdn Bhd adalah milik M Isa Bin Halilhan dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 15(1) Akta Pencegahan Rasuah 1997 dan boleh dihukum di bawah seksyen 16 Akta yang sama.

Pertuduhan Kedua

Bahawa kamu, pada 26 April 2004 di Perpustakaan Negara Malaysia, Tingkat 17 Menara TH Selborn, Jalan Tun Razak, dalam daerah Kuala Lumpur dalam Wilayah Persekutuan, sebagai pegawai badan awam, iaitu Timbalan Pengarah Bahagian Gerakan Literasi Maklumat, Perpustakaan Negara Malaysia telah menggunakan jawatan kamu itu untuk mendapatkan suapan apabila membuat keputusan memilih SJI Resources Sdn. Bhd. untuk membekalkan cenderamata kepada Perpustakaan Negara Malaysia dengan harga pembekalan sebanyak RM43,750.00, yang berhubungan dengan perkara yang suami kamu iaitu M Isa Bin Halilhan mempunyai kepentingan, yang mana SJI Resources Sdn. Bhd. adalah milik M Isa Bin Halilhan dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 15(1) Akta Pencegahan Rasuah 1997 dan boleh dihukum di bawah seksyen 16 Akta yang sama.

[2] The sessions court acquitted and discharged the appellant of both the charges at the end of the prosecution case. On appeal by the prosecution, the High Court ordered that the appellant's defence be called for both the charges.

[3] After hearing the appellant's defence, the sessions court convicted and sentenced the appellant to six months' imprisonment and a fine of RM94,000 in default of six months' imprisonment for the first charge. In regard to the second charge, the appellant was sentenced to six months' imprisonment and a fine of RM218,750in default of six months' imprisonment. The fines were paid by the appellant.

[4] Aggrieved by the decision of the sessions court, the appellant appealed to the High Court. After hearing the appeal, the High Court affirmed the convictions for both the charges but allowed the appeal against the sentences and reduced the imprisonment to 14 days for each of the charges. The High Court also ordered that the sentences run consecutively. However, the fines imposed by the sessions court were affirmed by the High Court.

[5] Aggrieved by the decision of the High Court, the appellant now appeals to this court.

THE TWO CHARGES

[6] Both the charges against the appellant stated that the appellant had used her office or position for gratification by awarding to SJI Resources Sdn Bhd

('SJI'), in which her husband by the name of M Isa bin Halilhan, has an interest, the right to supply souvenir items to the National Library, an offence under s 15(1) of the ACA.

[7] The value of the contract in the first charge was RM18,800 while the value of the contract for the second charge was RM43,750.

[8] The prosecution did not call M Isa bin Halilhan as a prosecution witness notwithstanding the fact that his name was mentioned in both the charges. The non-calling of this gentleman was also raised in the petition of appeal.

[9] As a material witness, M Isa bin Halilhan should be called by the prosecution. The non-calling of this witness has prejudiced or disadvantaged the defence. And s 114(g) of the Evidence Act 1950 should be invoked against the prosecution. To borrow the words of Lord Roche in *Seneviratne v R* [1936] 3 All ER 36 at p 37 (PC), the calling of M Isa bin Halilhan was 'essential to the unfolding of the narrative on which the prosecution case is based' or in the sage words of that brilliant judge Mohamed Azmi SCJ in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 at p 494 (SC), as 'an important and material witness to the case'.

THE CASE FOR THE PROSECUTION

[10] The appellant was the 'Timbalan Pengarah, Bahagian Gerakan Literasi Maklumat, Perpustakaan Negara Malaysia' and as head of the division, she had the authority to award tenders below RM50,000. The 'Perpustakaan Negara' ('the National Library') had launched its annual national monthly reading programme, popularly known as the 'Program Bulan Membaca Kebangsaan'. And the purchase of all souvenir items in connection with the said programme was undertaken by the appellant's division.

[11] The appellant, in her capacity as the head of the division, awarded to SJI the right to supply souvenir items through two 'Borang PT1' both dated 27 April 2004 as seen in exhs 'P1' and 'P3'. Exhibit 'P1' was in relation to the supply of souvenir items worth RM18,800 and it was approved by the appellant and her signature appeared thereto. Likewise exh 'P3' pertained to the supply of souvenir items worth RM43,750 and it was also approved by the appellant and her signature appeared thereto. These two purchases were confirmed by Norshidah bt Mohd Zanadi ('SP7') and she was also responsible for preparing the local orders as reflected in exhs 'P8' and 'P10' based on

exhs 'P1' and 'P3'.

THE ANALYSIS

[12] Only three grounds were canvassed before us, namely:

(a) that the sessions court judge misdirected herself when she invoked the presumption under s 42(1) of the ACA against the appellant;

(b) that the sessions court judge misdirected herself when she failed to appreciate that the correct presumption to be rebutted would be the presumption under s 15(2) of the ACA; and

(c) that the sessions court judge failed to appreciate the defence case.

THE FIRST TWO GROUNDS

[13] The sessions court judge misdirected herself when she invoked the presumption under s 42(1) of the ACA against the appellant. Similarly, the High Court judge was also in error when His Lordship applied the presumption under s 42(1) of the ACA. For convenience, s 42(1) of the ACA is produced herewith:

> 42 Presumption in certain offences.
>
> (1) Where in any proceedings against any person for an offence under section 10, 11, 13, 14 or 15 it is proved that any gratification has been accepted or agreed to be accepted, obtained or attempted to obtained, solicited, given or agreed to be given, promised, or offered, by or to the accused, the gratification shall be presumed to have been corruptly accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised or offered as an inducement or a reward for or on account of the matters set out in the particulars of the offence, unless the contrary is proved.

[14] It is patently clear that the presumption under s 42(1) of the ACA can be invoked against the appellant when it is proven beyond reasonable doubt that any gratification has been 'accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised or offered, by or to the accused …'. Here, there was no evidence to that effect. There was neither evidence that the appellant accepted or agreed to accept the gratification nor evidence that the appellant obtained or attempted to obtain the gratification nor evidence that the appellant solicited the gratification. In short, there was no evidence that the prerequisites or the condition precedents to s 42(1) of the ACA have been proven by the prosecution. That being the

case, the presumption under s 42(1) of the ACA cannot be invoked against the appellant. In the sage words of Thomson CJ in *Ng Kim Huat v Public Prosecutor* [1961] 1 MLJ 308 at p 309:

> It is surely elementary to observe that while a statutory presumption when it arises may operate in place of evidence and so reverse the onus of proof on any point the bare potential existence of such a presumption cannot of itself dispense with proof of any fact the existence of which is a condition precedent of the presumption arising. To say otherwise would be to fly in the face of all the rules of logic.

[15] In *Thomas @ Severinus bin Kandadi v Public Prosecutor* [2009] 7 MLJ 803, Abdul Rahman Sebli JC (now J) held that the sessions court rightly invoked the s 42 presumption in a charge under s 15(1) of the ACA because there was evidence that the appellant had received a cheque in the sum of RM9,995 after he had signed the local purchase order to certify that the project work had been satisfactorily carried out when in fact it was not so.

[16] In the context of the present appeal, the right approach to be adopted by the sessions court would be to invoke the presumption under s 15(2) of the ACA once the High Court allowed the prosecution's appeal and rule that the appellant be ordered to enter her defence for both the charges.

[17] It is incumbent on the prosecution in a charge under s 15(1) of the ACA, to prove the following ingredients for the purpose of establishing a prima facie case against the appellant:

(a) that the appellant is a public officer, to wit, the 'Timbalan Pengarah, Bahagian Gerakan Literasi Maklumat' of the National Library; and

(b) in that capacity, the appellant had used her office for gratification by appointing SJI, a company belonging to her husband for supplying souvenir items to the National Library worth RM18,800 and RM43,750 respectively.

[18] And upon proof of these two ingredients, the statutory presumption under s 15(2) of the ACA would be invoked and activated and the appellant is presumed, until the contrary is proved, to have used her office for gratification.

[19] The wrong approach was adopted by the sessions court judge when she applied the presumption under s 42(1) of the ACA. To compound the matter further, although the sessions court judge made reference to s 15(1)–(2) of the ACA in her written grounds of judgment as seen at p 203 of the appeal record at *Jil* 2, yet she did not make any finding whether the appellant had rebutted the presumption under s 15(2) of the ACA. A blatant failure to make a finding

whether the presumption under s 15(2) of the ACA had been rebutted constitutes a serious misdirection which warrants the intervention of this court.

[20] Treading on the wrong footing, the sessions court judge in her written grounds of judgment at pp 206–207 of the appeal record at *Jil* 2 erroneously ruled that the presumption under s 42 of the ACA applied and the appellant had failed to rebut the said presumption. At pp 206–207 of the appeal record at *Jil* 2, this was what the sessions court judge said:

> Dari segi undang-undang di peringkat ini tertuduh perlu mematahkan anggapan Seksyen 42 APR, yang kini telah berpindah ke tangannya. Tertuduh harus dapat mematahkan anggapan bahawa apa yang beliau lakukan iaitu dengan jawatannya meluluskan syarikat milik suami beliau sebagai pembekal, telah dibuat secara rasuah dalam ertikata Seksyen 2 APR, 1997.

[21] Continuing at p 207 of the appeal record at *Jil* 2, the sessions court judge had this to say:

> Yang jelas perkara-perkara ini tidak boleh mematahkan anggapan yang wujud di bawah Seksyen 42 APR, 1997.

[22] It is patently clear, on the available evidence, that the approach of the sessions court judge was plainly wrong in that she invoked the wrong presumption. It cannot be denied that the appellant is prejudiced and a miscarriage of justice has occurred. The appellant was required to rebut a presumption which, on the facts and in law, did not apply and this resulted in the imposition of the wrong burden on the appellant. In regard to the wrong burden of proof, Abdul Malik Ishak, JCA had this to say in *Mardani bin Hussin v Public Prosecutor* [2011] 4 MLJ 83 at pp 92–93; [2009] 6 CLJ 301, at p 313 (CA):

> (29) Now, what the learned trial judge said was this. That the defence had failed to raise a reasonable doubt on the prosecution's case notwithstanding that the statutory presumption had been invoked. In law, when you talk about evidential burden, you are referring to the particular burden. The learned trial judge did not mince his words. It was an unfortunate choice of words. What he meant in regard to the underlined passage was that the appellant had to discharge the evidential burden or the particular burden of raising a reasonable doubt on the prosecution's case as opposed to rebutting the statutory presumption on the balance of probabilities which should have been the correct burden of proof for the appellant to discharge. The particular burden of proof has shifted to the appellant. It must be borne in mind that the burden to rebut the statutory presumption on the balance of probabilities is heavier than the burden of casting a reasonable doubt on the prosecution's case.

[23] And Abdul Hamid Omar LP in *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137 (SC), at p 142, had this to say about the wrong burden of proof in the context of that case:

> It is sufficient for us to say that the defence of the accused was probable and more than adequate to rebut the case for the prosecution. To illustrate the approach of the learned judicial commissioner let us quote instances from his finding. He said once defence is called accused must testify and support his contention with evidence both from witnesses or otherwise that he is not guilty of the charge.' This sentence interpreted narrowly would mean that the trial judge expected a higher standard of proof from the defence than of creating a reasonable doubt.

[24] The meaning of the phrase 'miscarriage of justice' has been lucidly explained by Fullagar J in *Mraz v The Queen* (1955) 93 CLR 493, at p 514, in the context of a jury trial which must equally apply to a trial before a single judge. There His Lordship had this to say:

> It is very well established that the proviso to s 6(1) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried.

[25] Here, in the context of the present appeal, the appellant was not accorded 'justice according to law'.

THE THIRD GROUND

[26] In essence, the defence of the appellant may conveniently be summarised in this way. That although she was the head of the division as its 'Timbalan Pengarah', she was not involved in the selection of SJI as the supplier of the souvenir items. She said that the selection was done by the secretariat and it was the duty of the secretariat to do so. At p 91 of the appeal record at *Jil* 2, when she testified under oath, she named the members of the secretariat as Puan Haliza Abu Husin, Puan Hasnita Zakaria ('SD3') and Puan Zaleha Zainal Abidin. According to her, these personalities were assisted by Cik Suriyana and Siti Ngaishah bt Hadi ('SD2') as well as Abdul Jalil bin Zainal ('SP2'), Mohd Helmi and Rayahu. Again, according to her, SD2 and SP2 played important roles in that both of them liaised with the suppliers.

[27] The appellant was referred to exhs 'P1' and 'P3' and she testified, under oath, that she had no hand in selecting SJI (see p 98 of the appeal record at *Jil* 2). The appellant also testified that although SJI belonged to her husband, she did not know that SJI had submitted its bid.

[28] In regard to exhs 'P1' and 'P3', she testified that she could not remember when she signed them because she used to sign a number of documents. In its original text, this was what she said in examination-in-chief at pp 97–98 of the appeal record at *Ji* 2:

> P1 dan P3 - saya tidak ingat bila saya tandatangan. Biasanya Pesanan Tempatan akan dikemukakan banyak, sekali bersama surat-surat lain. Adakalanya saya akan tandatangan di dalam bilik saya. Adakalanya kalau saya nak keluar pergi mesyuarat juga ada diminta tandatangan oleh Jalil. Bilik saya, bila saya keluar kena lalu depan staf. Bila nampak muka saya Jalil akan kemukakan kepada saya. Kemungkinan cara yang saya cakap mungkin berlaku ke atas P1 dan P3. Mungkin ia ditandatangan banyak dengan borang-borang Pesanan Tempatan yang lain. Saya tandatangan banyak, sekali. Dalam tahun 2004 ini, saya tiada pengetahuan khusus SJI ada buat permohonan untuk jadi pembekal.

[29] The appellant even challenged SP2's evidence that she gave him instructions to prepare exhs 'P1' and 'P3'. This was what the appellant said at p 98 of the appeal record at *Jil* 2:

> Yang khusus ditugaskan adalah Siti Ngaishah (SD2) dan Jalil (SP2). Jalil (SP2) kata beliau sediakan P1 dan P3 selepas saya arahkan dan setelah ID5 diserahkan kepadanya oleh saya, adalah tidak benar. Di bahagian saya P1 dan P3 disediakan oleh Jalil (SP2) — tugas beliau — tentang kewangan tugas Pembantu Kanan Kewangan.

[30] The appellant also challenged the evidence of SP8 (Mohd Fazreen bin Che Rus) when SP8 testified that the appellant gave him instructions to prepare exhs 'P1' and 'P3'. In its original text, this was what the appellant said at p 98 of the appeal record at *Jil* 2:

> SP8 kata terima telefon dari saya. Saya tidak pernah hubungi beliau (pembekal). Selalunya di bahagian saya yang hubungi pembekal adalah Siti Ngaishah (SD2) dan Jalil (SP2). SP8 kata ada datang jumpa saya, seingat saya tak ada. Pembekal yang datang jumpa saya ramai. Biasanya saya akan redirect kepada urusetia.

[31] It must be borne in mind that SD2 and SD3 corroborated the evidence of the appellant that it was the secretariat that decided to award the contract to SJI based on the samples and the pricing. They were very clear in their evidence that the appellant did not, at any time, interfere with the decision making process of the secretariat.

[32] It is apparent that the sessions court judge failed to adequately consider or appreciate the defence case. Judicial appreciation of the defence case was minimal. This is clearly in contravention of the mandated provisions of s 173(m)(i) of the Criminal Procedure Code. It constitutes only a single paragraph as seen at p 207 of the appeal record at *Jil* 2. The importance of considering the whole of the evidence objectively and viewed from all angles should have been carried out by the sessions court judge. In that way, the appellant would have a fair chance of being acquitted (*Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 (SC) at p 142; [1993] 2 AMR 27 (SC) 1135 at p 1141). Put in another way, all aspects of the defence case must be adequately and judicially considered by the sessions court judge and this was not done (*Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2006] 2 MLJ 197; [2006] 1 CLJ 857 (FC)).

[33] The criticisms of the appellant's defence by the sessions court judge centred on two main points:

(a) that the defence was nothing more than a bare denial; and

(b) that there was no criteria why SJI was selected.

[34] Taking the first point, it is crystal clear that the sessions court judge failed to appreciate the difference between a bare denial and an explanation coupled with a challenge. Both SD2 and SD3 supported the appellant's explanation and their pertinent evidence, taken cumulatively, succeeded in raising a reasonable doubt. The evidence of both SD2 and SD3 were tested and they stood firm and were not discredited in any way. Yet, the sessions court judge has not given any reasonable reason as to why their evidence could not believed. In our judgment, there was direct evidence from both SD2 and SD3 that it was the decision of the secretariat that selected SJI and that the appellant had never interfered at all (see pp 111 and 118 of the appeal record at *Jil* 2).

[35] The cross-examination of SD3 by the prosecution showed the stand of the prosecution that it was the secretariat that decided to pick SJI. At pp 121–122 of the appeal record at *Jil* 2, the cross-examination of SD3 went along the following line:

S: Bila Siti Aisyah sign P1 dan P3 bermakna dia setuju dengan cadangan urusetia?

J: Ya.

[36] And under re-examination, SD3 testified that the appellant did not participate in the selection. SD3 was asked in this way (see p 123 of the appeal record at *Jil* 2):

S: Siti Aisyah terlibat dengan pemilihan?

J: Tiada.

[37] It is germane to mention that the prosecution did not challenge the evidence of SD2 and SD3 and put to them that the secretariat was not in charge of the selection.

[38] In regard to the second point that there was no criteria why SJI was picked, we have this to say. The answers are to be found in the evidence of both SD2 and SD3 which showed that the criteria were the samples and the pricing. This aspect of the defence case was not adequately considered by the sessions court judge. Under cross-examination, SD2 was asked this pertinent question (see p 114 of the appeal record at *Jil* 2) and she gave the answer in this way:

S: Juga tidak ingat mengapa pilih SJI Resources?

J: Berdasarkan harga dan sampel yang diberi.

[39] Again, the same answer was extracted from SD3 under cross-examination at p 121 of the appeal record at *Jil* 2:

S: Mengapa pilih SJI Resources?

J: Bergantung kepada sampel dan harga yang ditawarkan.

[40] Yet, the sessions court judge said that there was no criteria in the selection of SJI.

[41] At this juncture, it is instructive to reproduce the speech of Chan Sek Keong J (as he then was), delivered in the Court of Criminal Appeal, in the case of *Neville v Public Prosecutor* [1992] 1 SLR 153, at p 161:

> It is the duty of the trial judge or judges to consider the defence of the accused and the evidence that is adduced in support of that defence. That is fundamental. A failure to carry out that duty will inevitably lead to a miscarriage of justice. Where the evidence adduced at a trial, whether it be adduced by the prosecution or the defence, will exonerate the accused of the offence with which he is charged, or reduce it to some lesser offence, it is also the duty of the trial judge or judges to consider such evidence to determine whether it is sufficient to acquit the accused or reduce the charge, even if the accused himself, whether or not he is represented by counsel, has not raised the particular defence which has that effect. The role of the court is to find whether or not the accused is guilty as charged on the evidence placed before it. But there must be some evidence on which the court can act.

[42] However, a caveat must be placed. Although the trial judge has a duty to consider the defence, he must not accept everything that is advanced by the

defence as the gospel truth. He must assess the defence version and reject outright the versions which were untrue and not reasonable, based entirely on the evidence adduced before him. In short, he ought to undertake an assessment of the available evidence. We venture to say that based on the available evidence, the trial judge is also entitled to consider the defence which is not specifically pleaded or raised. Any omission to do so must be construed as a misdirection and that would attract appellate intervention (*Syed Abu Bakar bin Ahmad v Public Prosecutor* [1984] 2 MLJ 19 (FC); and *Lim Guan Eng v Public Prosecutor* [1998] 3 MLJ 14 (CA)).

[43] Justice and fairness dictate that the trial judge is duty bound to judicially appreciate the defence case and consider all the relevant aspects of the defence case including those parts of the evidence that may be in favour of the defence (*Tengku Mahmood v Public Prosecutor* [1974] 1 MLJ 110; *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2006] 2 MLJ 197 (FC); and *Kumaraguru a/l N Muniandy & Ors v Public Prosecutor* [1994] 1 MLJ 254).

[44] It is also salutary to say that no matter how weak or unreasonable the defence version may be, the trial court should not brush it aside without evaluating or giving due consideration to it. And the trial court should not just provide lip service to the defence version without assessing it (*Balasingham v Public Prosecutor* [1959] 1 MLJ 193; *Gooi Loo Seng v Public Prosecutor*; *Ganapathy a/l Rengasamy v Public Prosecutor* [1998] 2 MLJ 577 (FC); *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705 (FC); *Chan Chor Shuh v Public Prosecutor* [2003] 2 MLJ 26 (CA); *Pendakwa Raya lwn Mohd Zulkifli bin Abdul Ghani dan satu lagi* [2003] 5 MLJ 337; *R v Emmanuel* [1998] Crim LR 347 (CA); *Ong Ah Too v Regina* [1955] 1 MLJ 247 (CCA); *R v George Anthony Porritt* (1961) 45 Cr App R 348 (CA); *Kwaku Mensah v R* [1946] AC 83 (PC); *Chee Chiew Heong v Public Prosecutor* [1981] 2 MLJ 287; *Ayoromi Helen v Public Prosecutor* [2005] 1 MLJ 699 (CA); and *Public Prosecutor v Johar Mustafa* [2003] MLJU 342; [2004] 5 CLJ 187).

[45] There are two other legal issues that should be addressed. The first concerned the failure of the sessions court judge to consider the cautioned statement of the appellant. The second revolved on the question of mens rea pursuant to the offence under s 15(1) of the ACA.

[46] In regard to the first legal issue, the appellant's cautioned statement in exh 'D21' as seen at pp 424–435 of the appeal record at *Jil* 3 was not considered by the sessions court judge at all. To compound the matter further, the High Court judge did not consider the appellant's cautioned statement in his written grounds of judgment. With respect, the appellant's cautioned statement should be considered and weighed accordingly. In our judgment, the failure or

omission to consider the appellant's cautioned statement constitutes a non-direction which amounts to a misdirection.

[47] The second legal issue brings into sharp focus the provision of s 15(1) of the ACA which enacts as follows:

> 15. (1) Any officer of a public body who uses his office or position for any gratification shall be guilty of an offence.

[48] 'Mens rea' is a necessary ingredient of the offence under s 15(1) of the ACA. Mens rea can be proved in diverse ways. Here, the sessions court judge acknowledged at p 207 of the appeal record at *Jil* 2 that there was 'carelessness' on the part of the appellant. That being the case, 'carelessness' should be construed as a defence because there was no mens rea on the part of the appellant to commit the offence.

[49] It is said that every crime requires a mental element (*Allchurch v Cooper* [1923] SASR 370). It is the state of mind that constitutes a particular crime: a guilty mind (*He Kaw Teh v R* (1985) 157 CLR 523).

CONCLUSION

[50] For these varied reasons, we unanimously allowed the appeal of the appellant. We set aside the convictions and sentences imposed by the High Court. Fines which were paid by the appellant must be refunded to her. We acquitted and discharged the appellant. She was set free.

Appeal allowed, convictions and sentences set aside, appellant acquitted and discharged and fines she had paid ordered to be refunded to her.

Reported by Ashok Kumar